

Hon. Rebecca Berch (ret.)  
1501 W. Washington St., Ste. 410  
Phoenix, AZ 85007

SUPREME COURT OF ARIZONA

PETITION TO AMEND RULE 32	)	Supreme Court # R-16-0013
OF THE RULES OF THE	)	
SUPREME COURT OF ARIZONA	)	Reply
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Petitioner served as Chair of the Supreme Court’s Task Force on the Review of the Role and Governance Structure of the State Bar of Arizona (hereinafter the “Task Force”). The Task Force submitted its report to the Supreme Court on September 1, 2015. On January 8, 2016, Petitioner filed a rule petition requesting amendments to Rule 32 of the Rules of the Supreme Court of Arizona. Petitioner requested, and this Court ordered, a modified comment period for this rule petition. There were nine comments to the petition filed during the first comment period. Petitioner then filed an amended petition. There were six comments to the amended petition, and this reply focuses on matters raised by those six comments.

An Appendix to this reply integrates into one final document all of the changes proposed by both the original petition and the amended petition. The final

document includes redline and clean versions of the proposed amendments to Rule 32.

**Part I: Background.** Supreme Court Administrative Order 2014-79 established the Mission and Governance Task Force. The Order directed the Task Force to review the Rules of the Supreme Court on the mission and governance structure of the State Bar of Arizona (“SBA”) and to make recommendations concerning the SBA’s mission and governance.

**II. Pre-petition comments.** The Task Force welcomed input throughout its term. However, one comment to the amended petition reported:

[T]he Mission and Governance Task Force largely operated under-the-radar during its term. Although announcements, meeting packets and meeting minutes were made available on the Arizona Supreme Court’s Task Force website during August 2014 and July 2015, apart from that scant attention, its work went mostly unnoticed.

Petitioner disagrees. The January 2016 rule petition noted that the Task Force posted a draft report on its webpage in August 2015. Petitioner summarized the work and recommendations of the Task Force in a video that appeared on the webpage adjacent to the draft. In the video, Petitioner also invited comments on the draft, and the Task Force established an Outlook “Bar Governance” mailbox for those comments. The SBA publicized this information in an email “blast” it sent to its membership on August 10, 2015. While it is true that the draft report was open for comment for two weeks, Petitioner accepted late comments, and

there is little reason to believe that the Task Force would have received substantially more comments had it been open for a month or two. Moreover, the draft report was a prequel to the January 2016 rule petition, and this petition was open for comments for several months.

The January 2016 rule petition also overlooked mentioning the following two items. First, in October 2014, after the second Task Force meeting, staff sent an email to about three dozen presidents of local and specialty bar associations statewide. The email introduced the concept of the Task Force and the directives of Administrative Order 2014-79; it provided a link to the Task Force webpage, where meeting agendas, minutes, and materials were available; and it invited the recipients and members of their associations to attend Task Force meetings. Second, at page 6 of the June 2015 edition of the *Arizona Attorney* magazine, outgoing Bar President Richard Platt devoted his column to a discussion of “evolving versions” of the draft Task Force report. This magazine has wide circulation and readership, and the column gave notice to State Bar members that the Task Force’s governance proposals were forthcoming. As noted above, the Bar sent an e-mail blast to its members about two months later that included a link to the draft Task Force report.

Petitioner believes the comment that the Task Force “operated under the radar” mischaracterizes its history. The Task Force sought and welcomed input on its recommendations.

**Part III: The State Bar’s comment.** The State Bar’s comment agreed with the amended petition on some items, and disagreed with it on others.

**A. *Matters of agreement.*** Pages 2 and 3 of the State Bar’s comment confirm agreement with more than a half dozen items in the amended petition. Page 12 of the comment includes its support of proposed Rule 32(m) and the adoption of a public access policy for State Bar meetings and records.

Page 12 also indicates the Bar’s agreement with a proposed amendment to Rule 32(c)(8). The proposed amendment states that members may “opt not to pay” a portion of the annual dues allocated to lobbying activities. The Bar’s comment notes

...the understanding that the State Bar will be granted discretion to determine the mechanics of such a provision, including whether to make this option ‘opt in’ or ‘opt out.’

Although Petitioner appreciates the Bar’s understanding, other comments to the amended petition favor the “opt in” alternative, and the Court will accordingly determine whether to adopt either option.

**B. *Matters of disagreement.*** The State Bar disagrees with the amended petition on two major subjects. First, the Bar contends it should continue to

appoint public members to the board. This is the current process for appointment of public members. In contrast, the petition proposes that the board nominate public members, and that the Supreme Court appoint them.

Petitioner does not dispute that the board has, in the past, worked diligently to attract, vet, and appoint stellar public members. However, the comment fails to demonstrate why the board could not also attract, vet, and nominate stellar members for the Court's consideration. Petitioner's proposal would increase the Court's oversight over the State Bar, and that would be a progressive change that enhances the Bar's role of protecting the public and helps ensure compliance with the state control mandate in *North Carolina State Board Of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

Second, the Bar contends, "a larger board is necessary to carry out essential board functions, to foster full representation of the State Bar's members, and to meet diversity objectives." (SBA comment at page 6.) Petitioner acknowledges the work of board members is important, including serving as liaisons to sections or reviewing dozens of rule petitions and RAJIs. However, Petitioner also believes there may be other ways to assign or distribute this work, including relying more on members of the board's standing committees who have considerable subject matter expertise.

The Bar also contends a reduction in the number of elected board members will have the “consequence of drastically reducing the number of representative voices our members have on the board.” (SBA comment at page 9.) Petitioner and members of the Task Force believe those who serve on the board do not solely serve those members who vote for them. Rather, they are fiduciaries of an organization that represents the profession as a whole. A major goal of the Task Force was mitigating the notion of elected board members as “representatives” of lawyer constituencies.

Petitioner notes parenthetically that 12 of the 18 currently elected board members (that is, 67% of the board) are from Maricopa and Pima counties. By comparison, under modified Option Z, 7 of the 10 elected board members (70%) would be from those two urban counties; and 14 of the 18 elected board members (77%) would be from Maricopa and Pima counties under the board’s alternative governance proposal. Thus, in any event, modified Option Z more closely aligns with the proportions of the currently elected board.

The Bar submits that a reduction in the size of the board would decrease diversity. But a smaller board would not necessarily reduce diversity. If it did, the Court can address diversity through its appointments of public members and members at-large.

Finally, at page 11 of its comment the Bar offers a compromise: that the Court should reduce the size of the board by eliminating the law school deans as *ex officio* members. Petitioner simply notes that this was part of the Bar’s original proposal, as set out in the January rule petition. (See the Petition at page 11.)

**Part IV. The Goldwater Institute (“Institute”) comment.**

**A. *Transparency.*** The Institute acknowledges (at page 1 of its comment) that proposed Rule 32(m) addresses the issue of State Bar transparency, but it also suggests the Bar should be subject to Arizona statutes concerning public meetings and records. Supreme Court Rule 123 concerns access to judicial records. Rule 123(a) specifies that the Court promulgated Rule 123

pursuant to the administrative powers vested in the supreme court by Article VI, Section 3, of the Arizona Constitution, and the court’s inherent power to administer and supervise court operations....

Proposed Rule 32(m) would have a similar basis under the constitutional and inherent powers of the Court. The Institute has not shown that the Court’s open records provisions have not proved adequate to protect the public, or that the public would be better served were the transparency rules grounded in laws applicable to executive agencies.

**B. *Opt-in v. opt-out.*** The Institute’s comment provides an analysis of the distinction between “opt-in” and “opt-out” and states a preference for the former. As Petitioner previously noted, the proposed rule might allow the State Bar to

choose either mechanism. However, the procedure for either “opt-in” and “opt-out” should be straightforward. Opting-in would require the member to add an amount to the bottom line of the annual dues statement, while opting-out would allow the member to deduct that amount. Lawyers should be able to discern the meaning of, and act on, whichever option the dues statement offers.

*C. Integrated v. voluntary bar.* The Institute’s comment also raises the issue of whether the State Bar should be integrated or voluntary. Administrative Order 2014-79 did not expressly direct the Task Force to examine whether Arizona should have an integrated bar, but the Task Force nonetheless considered that issue. Pages 6 through 9 of the September 2015 Task Force report to the Court included a discussion of this issue. Page 8 of the report notes that Arizona has had an integrated bar since the State Bar of Arizona was established in 1933. After extensive study and discussion, the Task Force concluded, with one dissenting vote, that the State Bar of Arizona should continue to be an integrated bar. The proposed amendments to Supreme Court Rule 32(a) codify that conclusion. The proposed amendments to Rule 32(a) provide,

- (1) **Practice of law.** Every person licensed by this Court to engage in the practice of law must be a member of the State Bar of Arizona in accordance with these rules.

**Part V. Other comments.** Mr. Hernandez submitted a comment to the amended petition. However, his comment raises issues also raised in either his



comment to the original petition, Mr. Avelar's previous comment to the original petition on behalf of the Institute for Justice, or the Goldwater Institute's recent comment. Mr. Smith and Ms. Krug also reiterated points in their recent comments that were contained in their earlier ones. Mr. Morris' comment, although new, simply adopts the prior comments of Mr. Hernandez, Mr. Avelar, and Ms. Krug. The responses above addressed the issues raised in these comments.

**Part VIII. Conclusion.** Petitioner requests the Court to consider the proposals encompassed within this rule petition, and to adopt them in whole or in part as it deems appropriate.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of July, 2016

By /s/  
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